Supreme Court, U. S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-971.

ANGELO CEFALU,
APPELLANT AND PETITIONER,

v.

GLOBE NEWSPAPER COMPANY,
APPELLEE AND RESPONDENT.

APPEAL FROM AND PETITION FOR A WRIT OF CERTIORARI
TO THE APPEALS COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.

Motion to Dismiss
and
Brief in Opposition to Petition for a Writ of Certiorari.

JAMES F. MCHUGH,
BINGHAM, DANA & GOULD,
100 Federal Street,
Boston, Massachusetts 02110.
Attorney for the Appellee-Respondent.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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The respondent moves that this Court dismiss the present appeal on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument. In addition, respondent respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the Appeals

Court for the Commonwealth of Massachusetts in this case. The relevant opinion is reported at Mass. App. Ct. Adv. Sh. (1979) 1437, 391 N.E. 2d 935.[1]

I. The State Rule Involved, the Questions Presented, and the Nature of the Case.

A. The Rule.

The appeal sought by petitioner raises a question concerning the validity of a Massachusetts rule of civil procedure governing summary judgment. The Massachusetts Rules of Civil Procedure, effective July 1, 1974, are modeled after the Federal Rules of Civil Procedure. The rule in question, Mass. R. Civ. P. 56, deals with summary judgment and, in all material respects, is identical to the cognate federal rule, Fed. R. Civ. P. 56. Petitioner contends that the Massachusetts rule, on its face and as applied, violated his right to a trial by jury, a right which he contends is conferred on all citizens of the United States by the Seventh Amendment to the Constitution of the United States and which the states are disabled from denying by virtue of the "privileges and immunities" clause of the Fourteenth Amendment to the Constitution.

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[1] Petitioner has filed with this Court a combined jurisdictional statement and petition for a writ of certiorari. Given his pursuit of an appeal, it is not clear that it was necessary for him to file a petition for a writ of certiorari. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 487 n.14 (1975); *Flournoy* v. *Wiener*, 321 U.S. 253, 263 (1944); 28 U.S.C. § 2103. Nevertheless, the route that the petitioner in fact has taken appears permissible. *Columbus & Greenville Ry. Co.* v. *Miller*, 283 U.S. 96, 98 (1931). Accordingly, the material which follows will deal both with petitioner's jurisdictional statement and with his petition for a writ of certiorari.

B. Questions Presented for Review by Certiorari.

Petitioner presents for review by way of certiorari three sets of alleged facts which he contends coalesce into three discrete questions for review. The first question, while difficult to understand fully, appears to be whether he was denied due process and equal protection of the law under the Fourteenth Amendment to the Constitution and whether the "privileges and immunities" described in that amendment were infringed by the Appeals Court for the Commonwealth of Massachusetts because of the manner in which that court articulated its view of the law and facts governing petitioner's appeal from allowance of respondent's motion for summary judgment in the trial court.

The second question appears to be whether, in effect, the "cumulative handling of this case by the Massachusetts courts at all levels" conferred on the press an absolute immunity from actions for defamation and invasion of privacy and thus allegedly violated rights guaranteed to petitioner under the First, Ninth, and Fourteenth Amendments to the Constitution.

The third question is whether the manner in which the Appeals Court for the Commonwealth of Massachusetts resolved petitioner's contention that the trial judge should have disqualified himself, *sua sponte*, from hearing respondent's motion for summary judgment violated petitioner's right to due process and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States and infringed upon the "privileges and immunities" described in the same amendment.

C. The Proceedings Below.

The proceedings below, in their full glory, are lengthy and extremely complicated. Reduced to essentials, however, in

connection with articles which it published on April 23, 1973, and on September 29, 1974, respondent published a photograph of persons lined up to collect unemployment benefits at the main office of the Commonwealth's Division of Employment Security in Boston, Massachusetts. That photograph included the visage of petitioner who was standing in the line, not to collect benefits himself, but to help a friend collect them. As a result, petitioner filed an action for libel and invasion of privacy. Summary judgment on his claims was entered in favor of respondent and petitioner appealed to the Commonwealth's intermediate appellate court, the Appeals Court. In an opinion entered July 9, 1979, and reported at Mass. App. Ct. Adv. Sh. (1979) 1437, 391 N.E. 2d 935, that court affirmed the judgment of the trial court. Insofar as petitioner's action concerned libel, the Appeals Court declined to reach the question whether the photograph, in the company of the surrounding text, was defamatory. Instead, it held that, whether or not defamation had occurred, respondent had not been guilty of negligence.[2] With respect to his claim for invasion of privacy, the Appeals Court held that respondent's actions did not violate the statutory right to privacy enjoyed by citizens of the Commonwealth under Mass. G.L. c. 214, § 1B. Finally, the Appeals Court held that the trial judge was not required to disqualify himself from hearing respondent's motion for summary judgment. The opinion of the Appeals Court is reprinted in full as Appendix G to petitioner's combined jurisdictional statement and petition for writ of certiorari.

Following entry of the opinion of the Appeals Court, petitioner sought further appellate review in the Supreme Judicial

[2] In the wake of this Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Judicial Court for the Commonwealth of Massachusetts ruled that "private" individuals could recover on a claim for libel by proving negligent publication of a defamatory falsehood. *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 850-851 (1975).

Court, the Commonwealth's highest appellate court. Under state law, review in that court following an opinion of the Appeals Court is discretionary and is granted only for substantial reasons affecting "the public interest or the interests of justice." Mass. G.L. c. 211A, § 11. By order entered September 28, 1979, the Supreme Judicial Court exercised its discretion in favor of denying further appellate review. The Supreme Judicial Court's order appears at Appendix H to the combined jurisdictional statement and petition for a writ of certiorari petitioner has filed here. The present proceedings in this Court followed.

II. Reasons Why the Appeal Should be Dismissed and a Writ of Certiorari Should Not be Granted.

A. The Appeal Presents No Substantial Federal Question.

Petitioner's claim that, on its face and as applied to him, Mass. R. Civ. P. 56 denied to him a right to a jury trial guaranteed by the Seventh and Fourteenth Amendments to the Constitution of the United States is an insubstantial, if not frivolous, claim. In the first place, this Court has held that the right to a jury trial guaranteed by the Seventh Amendment to the Constitution does not apply to trials in state courts. *See, e.g., Alexander* v. *Virginia*, 413 U.S. 836 (1973); *Melancon* v. *McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972), *aff'd mem.* 409 U.S. 943 (1972). Beyond that, even if one were to assume that petitioner had some federal right to a jury trial in a state court, it is surely too late to argue that a state provision for summary judgment violates that right, particularly in view of the length of time summary judgment procedures have existed, in one form or another, in virtually all of the courts of this na-

tion. *See generally*, 10 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2711, pp. 364-370 (1973).[3]

B. The Questions Presented by Petitioner for Review by Certiorari Meet None of the Requirements of Rule 19.

Under United States Supreme Court Rule 19, it is clear that review by way of certiorari is available only in a limited number of circumstances. None is present here.

The first question presented by petitioner — in essence, whether rights guaranteed by the Constitution were denied to him by the manner in which the Commonwealth's Appeals Court articulated its decision — is frivolous. Nothing in the record supports the conclusory allegations presented by petitioner's formulation of that first question at page 6 of his combined jurisdictional statement and petition, and even a cursory review of the Appeals Court's decision reveals that it is carefully considered and thoughtfully framed. Moreover, petitioner cites nothing in the way of precedent, from this Court, from any other federal court, or from any state court, which gives meaningful flesh to the skeletal arguments he has voiced in formulating that first question.

Petitioner's second question — whether the "cumulative handling" of his case at all levels of the Massachusetts courts has "restored" to the press an absolute immunity from actions for libel or invasion of privacy — is not truly a federal question at all. With certain conceivable exceptions not relevant here, tort law, and the rights and correlative duties thereby recognized, are wholly the product of state law. *See generally*,

[3] Although he now appeals *pro se*, and although he appeared *pro se* in the appellate proceedings below, petitioner was represented by counsel at and before the summary judgment hearing.

New York Central R.R. Co. v. *White*, 243 U.S. 188 (1917); *Mountain Timber Co.* v. *Washington*, 243 U.S. 219 (1917); *Pinnick* v. *Cleary*, 360 Mass. 1, 12-14 (1971); Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954). The federal Constitution may have something to say, as it surely does in connection with actions for libel and invasion of privacy, concerning how far state rules governing the imposition of tort liability may go. *See, e.g., Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). The Constitution does not require, however, that a state have any such rules. Accordingly, to assert that a decision of a state court has, in effect, abolished actions for libel or for invasion of privacy does not implicate in the least any provision of the federal Constitution.

Beyond that, even if there is, somewhere, a federal right to freedom from libelous statements made, or invasions of privacy committed, by a private citizen, the opinion of the Appeals Court did not trench on that right. Instead, it simply resolved petitioner's claim with respect to libel on the basis of its conclusion that respondent had not been negligent and resolved petitioner's claim for invasion of privacy on the ground that respondent's actions did not invade the right of privacy created by state statute. Neither of those grounds for resolution implicates, in even the vaguest way, any federal right.

Petitioner's third question — concerning the Appeals Court's resolution of his claim that the trial judge should have disqualified himself, *sua sponte* — is also frivolous. The Appeals Court's treatment of that issue appears at page G7 of the combined jurisdictional statement and petition for a writ of certiorari petitioner has filed with this Court. However the matter is handled under state law, surely the bare fact of prior contact between counsel for respondent and the trial judge on a matter wholly unrelated to the claims asserted by petitioner is not sufficient to raise a substantial question which implicates a federal right. That conclusion necessarily follows, *a fortiori*,

from cases such as *Hortonville Joint School District No. 1* v. *Hortonville Educ. Ass'n*, 426 U.S. 482 (1976); *Withrow* v. *Larkin*, 421 U.S. 35 (1975); *Murphy* v. *Florida*, 421 U.S. 794 (1975).

III. Conclusion.

In light of the foregoing, respondent respectfully submits that the questions upon which this cause depends are so insubstantial as not to need further argument and, as a result, moves that the appeal be dismissed and the petition for certiorari be denied.

Respectfully submitted,

JAMES F. McHUGH,
BINGHAM, DANA & GOULD,
100 Federal Street,
Boston, Massachusetts 02110.
Attorney for the Appellee-Respondent.

Dated: January 18, 1980.